Filed 9/24/12 P. v. Fisher CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GALEN FISHER, Defendant and Appellant.	H036947 (Monterey County Super. Ct. No. SS091406A)

Following a jury trial, appellant Galen Fisher was found guilty of false imprisonment of an elder (Pen. Code, § 368, subd. (f), count one), elder abuse (§ 368, subd. (b)(1), count two),[1] two counts of criminal threats (§ 422, count three, victim Caroline Tugle, count five, victim Christina Cordell), drawing or exhibiting a firearm (§ 417, subd. (a)(2), count six), carrying a loaded firearm with a prior conviction for a crime against a person and property (former § 12031, subd. (a)(1)(E), count seven)[2] and carrying an unregistered firearm (former § 12031, subd. (a)(1)(F), count eight). As to counts one, two, three, the jury found true the allegation that in the commission of the offenses appellant personally used a firearm within the meaning of section 12022.5, subdivision (a) and was armed with a firearm within the meaning of section 12022,

---

1 All unspecified section references are to the Penal Code.

2 Section 12031 was repealed effective January 1, 2012, and reenacted as section 25850. (Stats. 2010, c. 711, § 4, 6.)

subdivision (a)(1). As to count five, the jury found true the allegation that appellant was armed with a firearm within the meaning of section 12022, subdivision (a)(1).

On May 13, 2011, the court sentenced appellant to 15 years, eight months in state prison consisting of the middle term of three years on count one, one-third the middle term or one year on count two, one-third the middle term or eight months on count three, one-third the middle term or eight months on count five, plus a 10-year enhancement pursuant to section 12022, subdivision (a)(1) for the personal use of a firearm on count one and one-third the middle term or four months for the arming allegation on count five. The court imposed a concurrent 365-day term on count six and one-third the middle term or eight months on counts seven and eight. Pursuant to section 654, the court stayed the terms on counts three and eight. This timely appeal followed.

On appeal, appellant challenges the sufficiency of the evidence of felony elder abuse. By way of a supplemental opening brief, appellant argues that section 654 bars multiple punishment for the false imprisonment, elder abuse and criminal threats charges and that the trial court erred in failing to give a unanimity instruction upon request as to count two (elder abuse).

Evidence Adduced at Trial

Appellant lived with his 70 year-old mother Caroline Tugle and her friend Christina Cordell on a 117-acre ranch; appellant occupied an apartment on the ranch while Ms. Tugle and Ms. Cordell lived in the main house. The ranch was located on East Carmel Valley Road.

On the afternoon of May 19, 2009, appellant went to Ms. Tugle's bedroom to give her a telephone message. When Ms. Tugle told him she could not read his writing, appellant became enraged. Appellant bent over Ms. Tugle and began shouting at her in an angry, intimidating manner that made Ms. Tugle feel "diminished." Appellant told Ms. Tugle, " 'You always do that to me. You always denigrate my validity.' " Appellant

stated, " 'You're always looking at the negative side. You've done this for years.' " Appellant called his mother a "fucking whore," and "a bottom feeding pond scum sucking worthless . . . back stabbing selfish pathetic little monkey in a human body with no morals and no hope for ever getting any." Ms. Tugle testified that the insults were "really hard to take."

Appellant, who was described by his mother as "extremely strong and tall," walked forward into the bedroom forcing Ms. Tugle to back up. Eventually, she was standing by the bed. Appellant grabbed her by the neck and started slapping her back and forth across her face. Then, he hit her with his fist or the heel of his hand on the top and side of her head.[3] Ms. Tugle did not respond to appellant because he was so angry and intimidating. She looked down and stayed quiet in the hope that the outburst would subside.

Ms. Tugle testified that appellant had started carrying around a handgun sometime in late February or early March. On the 19th, appellant had the handgun tucked into the back of his pants. Every now and then during his outburst he would put his hand back on the gun as if he was indicating "don't forget I've got this with me."

After quite a while, as things got "more scary," Ms. Tugle called to Ms. Cordell for help. When Ms. Cordell entered the room she saw appellant kicking Ms. Tugle's shins and shouting at her. Ms. Cordell testified that she saw appellant hitting Ms. Tugle in the head. Ms. Tugle was sitting on the bed with her knees up and back against the wall, with her head ducked down and both hands covering the sides of her head "and collapsing at the top of the back of [her] head." Ms. Cordell asked appellant what was going on; he told her not to interfere, he was doing what was necessary. Appellant turned and started to shout at Ms. Cordell to "shut up." Ms. Cordell testified that appellant did not threaten her in the bedroom, but did so later out in the hallway.

---

[3] Ms. Tugle was unsure how many times appellant slapped and hit her -- only that it was "[s]everal."

According to Ms. Tugle, while she was in the bedroom appellant told her "today was the day [she was] going to die and [he was] the one that should do it." Ms. Tugle said that when Ms. Cordell came into the bedroom, appellant told Ms. Cordell that she was going to die too. Appellant said that when Ms. Cordell was killed it would be Ms. Tugle's fault and when he killed Ms. Tugle it would be Ms. Cordell's fault.

When appellant turned his attention to Ms. Tugle, Ms. Cordell left the room. A few minutes later she came back and said she knew Ms. Tugle was planning to go to town that afternoon to get hay for the horses. She asked whether Ms. Tugle would get her some groceries. Ms. Tugle said that she was planning to go to town; she grabbed her purse, left the room and quickly went to get into her truck to leave. Ms. Tugle testified that she was very confused at this point, which she thought was from having been hit in the head.

Ms. Cordell testified that before Ms. Tugle went to the truck there were more altercations between appellant and Ms. Tugle; the first occurred in an outside courtyard where appellant continued shouting at Ms. Tugle, pulled a gun on her and told her he was going to make her extinct. Ms. Cordell interceded. Appellant turned on her and told her that they were both going to die. Ms. Cordell said that Ms. Tugle went to the kitchen; appellant sat down in the chair at the table, but then jumped out of the chair and began "throttling" Ms. Tugle. Again, Ms. Cordell interceded; there was more shouting and name calling; then, after about two hours appellant left. Ms. Tugle went to her bedroom and remained there for about "an hour or so." Ms. Cordell went to talk to her about leaving and Ms. Tugle said she had to get feed for the horses. Accordingly, Ms. Tugle got her keys and purse and went to pick up feed. Ms. Cordell saw Ms. Tugle go out to the pickup truck and get in. Ms. Cordell saw appellant out by the pickup; he had one hand on the truck; Ms. Tugle was inside the truck. However, she did not see any physical contact between appellant and Ms. Tugle. About 45 minutes later Ms. Tugle left.

Ms. Tugle testified that after she left the bedroom, she believed there was "another episode" in the courtyard, but she could not remember it.

Ms. Tugle said that when she went to the truck appellant got there before she did and would not let her get in. Appellant told Ms. Tugle that she was not going anywhere, grabbed her neck and whirled her around. He blocked the door to the truck so that she could not open it. Appellant was "trembling and twitching." Appellant took the gun from his belt and held it in his hand, sometimes pointing it at Ms. Tugle's chest or head. Appellant's anger escalated to a point Ms. Tugle had not seen before. Appellant told Ms. Tugle, "I have wanted for so many years to kill you and didn't know when or where it was going to be, but it's going to be right now." Appellant said that he had wanted to have revenge for a long time, but he had not been ready to do it until that day. Appellant described it as "justice" that he would be able to watch Ms. Tugle die.

Appellant said that he was going to shoot Ms. Tugle and then find Ms. Cordell and shoot her. Next, he was going to shoot the horses and then himself. Appellant resumed slapping Ms. Tugle's face and hitting her in the head. Finally, appellant's outburst subsided. Ms. Tugle told him she needed to go to get feed for the horses; he allowed her to leave.

Both Ms. Tugle and Ms. Cordell testified that when appellant threatened them they believed appellant's threats were genuine.

Ms. Tugle testified that appellant had these outbursts every three or four months, but in the previous few months the outbursts had become more frequent and more violent. Ms. Tugle did not report the prior outbursts because she was trying to handle them within the family in the hope that appellant would get better.

Ms. Tugle did not call the police while she was out getting feed, but after she returned to the house she realized that she could no longer handle appellant. According to Ms. Tugle she did not see Ms. Cordell when she returned, but Ms. Cordell testified that

when Ms. Tugle got home they went into the bathroom and discussed a plan to leave the next day under the guise of going to the laundromat.

Early the next morning, appellant knocked loudly on Ms. Tugle's bedroom door. He pushed his way into the room and told Ms. Tugle they had unfinished business from the day before. Appellant had the gun in his waistband. Ms. Tugle thought that appellant was going to kill her. She backed away from him, but he moved forward and pushed her into a sitting position on the bed. Appellant started kicking Ms. Tugle's lower leg and punched her in the head. He told her she was a "piece of shit."

Ms. Cordell heard the noise and came into the bedroom through the bathroom door. According to Ms. Tugle, appellant began berating Ms. Cordell; he told her she was going to die because of her association with Ms. Tugle. Ms. Cordell told appellant that she and Ms. Tugle were to do some laundry and that they would be back in a couple of hours; appellant let them leave.

Ms. Tugle and Ms. Cordell drove to town and called the Sheriff. Officer Michael Shapiro asked Ms. Tugle to telephone appellant and ask appellant to come to help her; she was to tell him that Ms. Cordell's car had broken down. Officer Shapiro came up with this rouse because he had been told that appellant was in a rage and had a handgun.

Before Ms. Tugle could telephone appellant, he telephoned her; he asked her to buy some coffee. During this conversation, Ms. Tugle told appellant the car had broken down.

When Officer Shapiro stopped the car appellant was driving, Officer Villasenor searched it. Officer Villasenor found a loaded handgun under the driver's seat. Ms. Tugle was shown the gun and testified that she recognized it as being similar to the gun appellant had on the 19th.

Officer Shapiro testified that when he interviewed Ms. Tugle, he saw no visible injury on her person.

Counsel stipulated that appellant had a previous conviction which made it unlawful for him possess a firearm; as of May 20, 2009, appellant had not registered any handguns with the California Department of Justice; and "East Carmel Valley Road is a public street in an unincorporated area where it was unlawful to discharge a firearm."

Discussion

Sufficiency of the Evidence of Felony Elder Abuse

It is a crime to inflict any physical pain or mental suffering upon an elder. (§ 368, subd. (c).) It can be a felony to do so "under circumstances or conditions likely to produce great bodily harm or death." (§ 368, subd. (b)(1).)[4]

Appellant argues that although he was convicted of felony elder abuse (count two), "the record does not support the finding that the 'circumstances or conditions' surrounding the incident were 'likely' to cause great bodily [harm] or death." Accordingly, he asserts that his conviction on count two must be reduced to a misdemeanor.

We review a claim of insufficient evidence by determining whether, viewing the whole record in the light most favorable to the prosecution, the record discloses substantial evidence—evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 690.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Ibid.*)

---

[4] Section 368, subdivision (b)(1) provides that a violation of the statute "under circumstances or conditions likely to produce great bodily harm or death" is punishable by "imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars ($6000), or by both that fine and imprisonment, or imprisonment in the state prison for two, three, or four years."

Whether or not the element "under circumstances or conditions likely to produce great bodily harm or death" is present is a question for the trier of fact. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1221.)

As appellant points out, the word " '[l]ikely means probable or . . . more probable than not.' " (*People v. Russell* (2005) 129 Cal.App.4th 776, 787 (*Russell*).)[5] However, likely also means "a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death." (*People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204.)

Appellant argues that although the assault was menacing and terrifying, it was not committed with such force or under circumstances that made great bodily injury more probable than not. Appellant concedes that he "touched" his mother several times during the incident, but never with enough force to cause great harm.

Appellant's argument does not account for the likely consequences of the slaps and punches to the head of a 70 year old woman by a man, who was described by his mother as extremely strong and tall. There was testimony that the slaps and punches caused Ms. Tugle to cower on the bed with her hands covering her head, from which the jury could have reasonably concluded the slaps and punches were delivered with some amount of force. Significantly, Ms. Tugle testified that she was very confused after appellant's repeated blows to her head—from which the jury could reasonably have concluded that the repeated blows to Ms. Tugle's head were likely to have caused some sort of temporary brain injury or other mental impairment.

Appellant's acts during the abuse must be judged in light of all the attendant circumstances—which included hitting his mother about the head with his fist or heel of

---

[5] In *Russell, supra,* 129 Cal.App.4th 776, the defendant pushed the victim into a four-lane street where the victim was struck by an oncoming vehicle. In upholding the defendant's conviction for violating section 245, subdivision (a)(2), the court reasoned it was "not necessarily the [amount of] force" the defendant used in pushing the victim, but the "injury-producing potential of the moving automobile" that "suppli[ed] the likelihood of great bodily injury or worse." (*Id*. at pp. 787, 788.)

his hand, kicking her in the shins and pointing a gun at her head and chest. Hitting anyone in the head with a fist or the heel of the hand creates a serious and well founded risk of great bodily injury, let alone when it is inflicted on a 70 year old woman. (See *People v. Racy* (1975) 148 Cal.App.4th 1327, 1333 [it is a matter of common knowledge that advanced age carries with it increased risks of injury].)

"Actual harm or injury is not requisite to a rational basis to conclude that the assault [on Ms. Tugle] was committed under circumstances likely to produce great bodily harm, as required by section 368, subdivision (b)(1). Section 368 is patterned on the felony child abuse statute, section 273a. The relevant passage of section 273a makes it a felony for a person to harm or endanger a child '*under circumstances or conditions likely to produce great bodily harm or death, . . .* ' (Italics added.) Our Supreme Court has recognized this derivation of section 368 and has held that it is appropriate to review decisions interpreting section 273a in addressing issues concerning the scope of section 368. [Citation.] Courts have held that there is no requirement under section 273a that the victim actually suffer great bodily injury. [Citation.]" (*Roman v. Superior Court* (2003) 113 Cal.App.4th 27, 35.)

In our view, a reasonable trier of fact could easily and justifiably conclude from the evidence that the punches and slaps that appellant inflicted on his mother's head and the kicks to her legs were "circumstances or conditions likely to produce great bodily harm" within the meaning of section 368, subdivision (b)(1).

As one court recognized long ago, "[t]he stroke of a fist or the kick with a shoe has invalided many a man or caused him to go into decline . . . ." (*People v. McCaffrey* (1953) 118 Cal.App.2d 611, 616-617.) The likelihood of great bodily harm is particularly high when blows are directed by means of hands at a vulnerable part of the body, such as the head. Ms. Tugle's advanced age significantly increased the risk of great bodily harm.

Accordingly, we find that there was ample of evidence to support appellant's felony elder abuse conviction.

Penal Code Section 654

The court imposed consecutive sentences for count one (false imprisonment), count two (elder abuse) and count three (criminal threats victim Ms. Tugle). The court stayed the punishment on the criminal threats count pursuant to section 654. However, the court made no explicit findings as to why the sentence on the elder abuse count should not be stayed under section 654.

By way of a supplemental opening brief, appellant argues that under the circumstances of this case, section 654 bars multiple punishment for the false imprisonment, elder abuse and criminal threats.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Thus, section 654 prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208 (*Latimer*).)

Accordingly, if a defendant is convicted of several offenses that were incident to one objective, the defendant may be punished for any one of such offenses, but not more than one. (*People v. Perez* (1979) 23 Cal.3d 545, 551 (*Perez*).)

To put it another way, section 654 has been applied not only where there is one "act" but also where there is a course of conduct that violates more than one statute, but nevertheless constitutes an indivisible transaction. (*Perez, supra*, 23 Cal.3d at p. 551.) Whether a course of conduct is divisible and thus gives rise to more than one act under section 654 depends on the defendant's intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved in part as stated in *People v. Correa* (2012) 54

Cal.4th 331, 334 [prohibition against multiple punishment for indivisible crimes does not apply to multiple violations of same provision].) If all of a defendant's offenses were incident to one objective, he or she may be punished for any one of the offenses, but not more than one. (*Ibid.*) However, if a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he or she may be punished for the independent violations committed in pursuit of each objective even though the violations were part of an otherwise indivisible course of conduct. (*Perez, supra,* 23 Cal.3d at p. 551.)

To put it succinctly, " '[i]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' [Citation.]" (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.)

If a defendant is convicted under two statutes for one act or indivisible course of conduct, section 654 requires that the sentence for one conviction be imposed, and the other imposed and then stayed. (*People v. Deloza* (1998) 18 Cal.4th 585, 591–592

As a general rule, the sentencing court determines the defendant's "intent and objective" under section 654. (See, e.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162, (*Coleman*).) We review the court's implied determination of a defendant's separate intents for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's findings the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

Initially, we note that the trial court did impose then suspend the punishment on count three. Section 654 " 'does not preclude multiple convictions but only multiple punishments for a single act or indivisible course of conduct. [Citation.]' " (*Coleman, supra,* 48 Cal.3d at p. 162.) Thus, here, we are concerned only with whether the punishment on count two (elder abuse) should have been stayed pursuant to section 654.

We note that as to the false imprisonment count, the prosecutor argued to the jury that appellant "intentionally detained Caroline Tugle by violence or menace. What do we know that he did? Out by the truck he grabbed her arm. He turned her around. He slapped her. He used physical violence. He held the gun out to her chest on occasion. He waived it around and he threatened to kill her."

Respondent argues that appellant's intent in committing felony elder abuse against his mother was to cause her both physical pain and mental suffering, whereas his intent in falsely imprisoning her was to prevent her from fleeing and keep her under his circle of control.

In *Latimer*, *supra*, 5 Cal.4th 1203, the defendant kidnapped his victim, drove her to the desert, and raped her. (*Id.* at p. 1205.) Ultimately, our Supreme Court held that section 654 applied, explaining "[a]lthough the kidnapping and the rapes were separate acts, the evidence does not suggest any intent or objective behind the kidnapping other than to facilitate the rapes." (*Id.* at p. 1216.) The Supreme Court noted that because the kidnapping was incident to the defendant's objective of rape, he could be sentenced only for rape and not for kidnapping. (*Ibid*.)

At first glance, the two separate crimes appellant committed here seem to be similar to the kidnapping and rapes in *Latimer* because the evidence suggests that they were committed incident to a single objective, with one crime (the false imprisonment) committed for the purpose of facilitating the other (elder abuse). Respondent concedes as much by asserting that appellant's intent in falsely imprisoning his mother was "to keep her under his circle of control." That is, keep her from leaving so he could continue, as respondent puts it, "his emotional and physical terrorism" of his mother.

Nevertheless, one relevant consideration in determining whether multiple crimes should be considered severable for section 654 purposes is the " 'temporal proximity' " of the crimes. (*People v. Evers* (1992) 10 Cal.App.4th 588, 603, fn. 10.) Where the offenses are " 'separated by periods of time during which reflection was possible,' "

section 654 does not prohibit multiple punishment. (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689, quoting *People v. Trotter* (1992) 7 Cal.App.4th 363, 368 (*Trotter*).)

In *Trotter, supra,* 7 Cal.App.4th at pages 365–366, defendant, while fleeing in a taxi from a police officer, fired three shots at the police car pursuing him. The first two shots were a minute apart, while the third came moments after the second. The appellate court held the trial court did not err in separately punishing defendant for the first two shots, and not the third. The court reasoned each successive shot by defendant made his conduct more egregious, and each shot posed a "separate and distinct risk" to the officer and the freeway drivers. (*Id*. at p. 368.) The *Trotter* court found that "this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. '[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.' " (*Ibid*.) Finally, the court observed that "even under the long recognized 'intent and objective' test, each shot evinced a separate intent to do violence . . . ." (*Ibid.*)

Here, there is evidence counts 1 and 2 were committed by separate, independent acts that became more "egregious" as they were committed or that posed "separate and distinct risk[s]" in the escalating manner envisioned in *Trotter*. Appellant's false imprisonment of his mother at the truck, where he prevented her from getting into the truck and then continued to abuse her, was committed after a period of time, by one estimate, at least two hours after the incidents in the bedroom and the courtyard.

As the *Trotter* court noted the purpose of section 654 is to insure that a defendant's punishment is commensurate with his or her culpability. (*Trotter, supra,* 7 Cal.App.4th at p. 367.) Similar to *Trotter*, the offenses presently under review did not arise from a

single volitional act. Rather, they were separated by considerable periods of time during which reflection was possible. Appellant's initial attack on his mother was interrupted by Ms. Cordell. Then, there was a break in the activity. After ample time for appellant to reflect, he prevented her from leaving and then resumed his attack on his mother. Between these two acts, appellant had time to reflect. At that point, by simply doing nothing, appellant could have ended his course of criminal conduct. Instead, he committed another volitional act—false imprisonment, embarking on a course of conduct that resulted in another act of violence—the continuation of the abuse of his mother. Appellant " 'should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.' " (*Trotter, supra,* 7 Cal.App.4th at p. 368.) Under the circumstances of this case, we conclude the court did not err in declining to stay the sentence on count two.

Failure to Give a Unanimity Instruction

Defense counsel requested a unanimity instruction as to count two—elder abuse. Counsel noted that there were "three or four different incidents separated by some amount of time and space." The prosecution argued the unanimity instruction was "improper" because the incidents on May 19 were part of an "ongoing course of conduct." The court refused to give the instruction. The court stated that "it would be confusing to the jurors to . . . give them the idea they had to pick out a specific incident in this kind of lengthy scenario in order to make a decision."

Appellant contends that the court erred in failing to give a unanimity instruction as requested.

"When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant

committed the same specific criminal act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 (*Melhado*).)

"In a criminal case, a jury verdict must be unanimous. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) "Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Ibid.*)

"The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.] Because jury unanimity is a constitutionally based concept, ' . . . the defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged.' [Citation.] From this constitutional origin, the principle has emerged that if the prosecution shows several acts, each of which could constitute a separate offense, a unanimity instruction is required. [Citations.]" (*Melhado, supra,* 60 Cal.App.4th at p. 1534.)

However, "[n]either an election nor a unanimity instruction is required when the crime falls within the 'continuous conduct' exception. [Citation]." (*People v. Salvato* (1991) 234 Cal.App.3d 872, 882 (*Salvato*).)

Generally, "[t]he continuous course of conduct exception arises in two contexts. [Citations.] 'The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]' [Citation.]" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299 (*Jenkins*).)

"The continuous course of conduct exception has been 'applied to varying crimes that cover " 'repetitive or continuous conduct' " [citation] such as child abuse [citations]; misdemeanor child annoyance or molestation [citations]; pimping [citation]; pandering [citation]; failure to provide for a minor child [citation]; contributing to the delinquency of a minor [citation]; and dissuading a witness from testifying [citation].' [Citation.]" (*Jenkins*, *supra*, 29 Cal.App.4th at p. 299.)

The exception was applied in the case of elder abuse in *People v. Rae* (2002) 102 Cal.App.4th 116 (*Rae*). *Rae* involved a continuous course of neglect of an elder over a one-month period. (*Id.* at pp. 118-121.) The defendant was convicted of one count of endangering the person or health of an elder under section 368, subdivision (b)(1), which then provided: " 'Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult . . . to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable . . . .' " (*Id*. at p. 121, fn. 2.) *Rae* held the trial court properly refused to give a unanimity instruction in the circumstances of that case, reasoning the alleged offense involved conduct that was continuous in nature, similar to the offenses of failure to provide for a minor child, child abuse, contributing to the delinquency of a minor and animal cruelty. (*Id.* at p. 122.)

Appellant attempts to distinguish *Rae* by arguing that the charge here arose not out of multiple events over a long period, but two discrete incidents, one in the bedroom and one near the truck, which occurred in a single day. Moreover, he asserts that this is not a case of neglect where the cumulative effect of inaction over many days leads to physical pain and mental suffering, and no single incident is the cause. Rather, the gravamen of this case centers on two separate assaults. Appellant asserts that a jury could reasonably

disagree as to which of these two incidents constituted the infliction of pain and suffering under conditions likely to cause great bodily harm or death. We are not persuaded.

Although the conduct that precipitated the charges in this case occurred only over the course of one day, there was evidence that the abuse had been going on for months. Further, as the prosecutor argued, appellant terrorized his mother from the time he gave her the phone message in her bedroom until the time she drove away from the ranch through a series of threats, physical abuse, and verbal insults. Although the action moved from the bedroom to the truck, appellant's physical and verbal barrage of abuse was continuous in nature; this was one prolonged assault on Ms. Tugle.

As to appellant's argument that a jury could reasonably disagree as to which of the two incidents (bedroom or truck) constituted the infliction of pain and suffering under conditions likely to cause great bodily harm or death, this argument fails to acknowledge that both incidents constituted the infliction of pain and suffering under conditions likely to cause great bodily harm or death. Appellant's conduct in both locations included blows to Ms. Tugle's head. Hitting a person around the head constitutes the infliction of pain and suffering; and we reiterate that the likelihood of great bodily harm is particularly high when, as here, the victim is a person of advanced age and the blows are directed by means of hands at a vulnerable part of the body, such as the head.

Accordingly, we conclude that the trial court did not err in refusing to give a unanimity instruction as to count two (elder abuse).

That being said, in reviewing this issue we noticed that as to the criminal threat count involving Ms. Tugle, count three, the evidence showed at least two or three threats made by appellant.[6] During argument, the prosecutor noted that appellant made the

[6] Although, initially, we asked for briefing as to a unanimity instruction for count three (victim Caroline Tugle), appellant pointed out that the same issue exists as to count five involving victim Christina Cordell. Accordingly, we will address this issue as to both counts three and five.

threat involving his mother on "at least a couple of occasions." No unanimity instruction was given, and it does not appear to this court that the prosecutor made a clear and unambiguous election as to the act upon which she was basing count three. Accordingly, we asked for supplemental briefing on the issue. Having received that briefing we now address the issue.

Implicitly, respondent concedes that the prosecutor did not make an election as to which of the acts involving Ms. Tugle and Ms. Cordell she was basing the charges for counts three and five, but argues that no unanimity instruction was required because "appellant's barrage of criminal threats against Ms. Tugle and Ms. Cordell were so closely connected in time and place as to form part of a single course of conduct. Moreover, appellant offered the same defense to all the acts. Accordingly, the trial court was not required to give a sua sponte unanimity instruction . . . ."

As noted *ante*, "[n]either an election nor a unanimity instruction is required when the crime falls within the 'continuous conduct' exception." (*Salvato, supra,* 234 Cal.App.3d at p. 882.) As respondent points out, and we have noted, there are two aspects to the continuous conduct exception; the first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. The second is when a statute contemplates a continuous course of conduct of a series of acts over a period of time. Respondent concedes that Penal Code section 422 does not contemplate a continuous course of conduct within the statute itself.[7] However,

---

[7] In *Salvato, supra,* 234 Cal.App.3d 872, the court held that the criminal threats statute, Penal Code section 422, "does not come within the continuous course of conduct exception." (*Id.* at p. 883.) In *Salvato,* the defendant was charged with dissuading a witness from testifying in violation of Penal Code section 136.1, subdivision (c)(1) and with making criminal threats in violation of Penal Code section 422. (*Id*. at p. 876.) These charges arose from the defendant's conduct, including making threats and gestures and leaving messages and letters, during a two month period when he and his wife were going through a divorce. (*Id.* at pp. 876-877.) Although the court did give a unanimity instruction, the defendant asserted that he was entitled to prosecutorial election. (*Id.* at p. 878.) On appeal, the court held that a violation of the criminal-threats statute was not a

respondent argues that the criminal threat charges in this case fall within the first aspect of the continuous course of conduct exception in that the acts were so closely connected in time as to form part of one transaction.

Acts viewed as a continuous course of conduct because they are a single transaction typically have a close temporal connection. (See *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) The question is how close is close enough to satisfy the single transaction standard.

Respondent cites to *People v. Purcelle* (2005) 126 Cal.App.4th 164 (*Purcelle*), *People v. Dieguez* (2001) 89 Cal.App.4th 266 (*Dieguez*), and *People v. Haynes* (1998) 61 Cal.App.4th 1282 (*Haynes*), in support of the argument that the first aspect of the continuous course of conduct exception applies in this case.

In *Purcelle, supra*, 126 Cal.App.4th 164, the defendant was convicted of three counts of using an altered, stolen, or counterfeit access card (§§ 484g, subd. (a), 487), one count of attempting the same crime, and one count each of acquiring access card information with fraudulent intent (§ 484e, subd. (d)), receiving or withholding stolen property (§ 496, subd. (a)), and theft or unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a)). (*Id*. at p. 168.) As to the attempted use of a counterfeit access card charge the evidence showed that the defendant visited Discount Cigarettes on September 20, 2002, twice and attempted to purchase 60 cartons of cigarettes. The two visits occurred in the space of approximately one hour. Defendant entered the store and asked to buy 60 cartons of cigarettes using a broken card. When the clerk's stalling made defendant nervous, he left, informing the clerks that he would return. When he returned

---

continuous-course-of-conduct crime in that the statute focused on an individual act and that an election as to which act the prosecutor was relying on for the charge was required. (*Id*. at pp. 883-884.) Even though the trial court gave a unanimity instruction, the appellate court found the failure to make an election prejudicial. The court reasoned that "the multiplicity of acts resulted in the kind of unfocused, diffuse and confusing presentation which could be prevented by requiring an election." (*Id*. at p. 884.)

he continued his effort to purchase 60 cartons of cigarettes with the same broken card he had used earlier. (*Id*. at pp. 169-170.)

On appeal, the defendant in *Purcelle* argued that the evidence that he entered the store, left, then came back, gave the jury the opportunity to convict him of the crime based upon either his first visit that day or his second. (*Purcelle*, *supra,* at p. 181.) This court held that there was no reasonable basis to distinguish between the defendant's first visit and his second visit a little over an hour later. The defendant did not proffer a separate defense to the two acts. His defense was based entirely upon an asserted lack of proof—proof that the broken card was indeed a counterfeit access card; and there was no conceivable construction of the evidence that would permit the jury to find defendant guilty of the crime based upon one act but not the other. Thus, no unanimity instruction was required. (*Id*. at p. 182.)

In *Dieguez*, *supra*, 89 Cal.App.4th 266, the defendant was convicted of perjury and one count of making a false material statement in support of a workers' compensation claim, in violation of Insurance Code section 1871.4, subdivision (a)(1). (*Id*. at p. 270-271.) The evidence showed that the defendant saw an orthopedic surgeon in connection with his workers' compensation claim. The defendant told the doctor that he had been injured in February 1997 lifting heavy packages on his job. He reported his injury to his employer, but was told that he would lose his route if he went to a doctor. He continued working until the work became too onerous on September 15, 1997. The defendant complained to the doctor of pain in his lower back and his right knee, cramps in his right leg, weakness in his right arm, and pain in his neck; he claimed he was completely unable to bend forward from a standing position. (*Id*. at p. 273.)

During argument, the prosecutor told the jury that the defendant could be found guilty of making a false material statement in support of a workers' compensation claim if any one of the following series of statements and representations he made to the doctor was in fact false: (1) he could not bend forward; (2) he originally injured himself in

February 1997 by lifting packages, and was told by his employer at that time that he would lose his route if he sought medical attention; (3) he could not move his neck; (4) he could not walk without stumbling or staggering; (5) he had never suffered any previous back injury; and (6) he had been unable to use his right arm since September 1997 and could only lift 20 pounds. The prosecutor argued that in the case of each of these representations, appellant was lying; and that considered together, all of this evidence proved that appellant had made knowing, material false statements to the doctor with the specific intent of obtaining workers' compensation benefits, in violation of Insurance Code section 1871.4, subdivision (a)(1). In response, the defendant argued a single defense: each false statement was the result of an innocent mistake in communication. (*Id*. at p. 275.)

On appeal, the appellate court held the continuous course of conduct exception clearly applied to the facts of the case. Each of the false statements alleged and relied upon by the prosecution were so closely connected as to form part of one continuing transaction. All the statements were made at the same appointment with the doctor; they were successive, compounding, and interrelated one to another; they were all aimed at the single objective of obtaining workers' compensation benefits; and they were barred from multiple punishment by Penal Code section 654. The defendant's statements grossly exaggerating the scope and nature of his claimed injuries during his one physical examination with the doctor were "so closely connected in time and purpose that they clearly formed part of a single, continuous transaction." Moreover, the defendant offered exactly the same defense to each of his false statements. There was no reasonable factual basis for the jury to distinguish between the defendant's various statements, and no reasonable legal basis to distinguish between them in establishing a single offense of making a false statement to obtain workers' compensation benefits under Insurance Code section 1871.4. Thus, no unanimity instruction was required. (*Id*. at pp. 275-276.)

In *Haynes, supra,* 61 Cal.App.4th 1282, the victim was robbed of $170 in cash by an unidentified and unapprehended teenage male (the robber), assisted by the defendant, who appeared on the scene in a blue Geo Metro. The incident consisted of two encounters. In the first, the robber struggled with the victim in a parking lot, through the victim's open car window, and took part of the cash when it tore in half as the victim drove away. The defendant arrived during this time and kicked the victim's passenger side window. The victim then left the lot, and defendant followed with the robber, now his passenger, and brought the victim to a stop some blocks away. There the robber struggled with the victim a second time, getting the rest of the cash, and defendant drove the robber away. (*Id*. at p. 1286.)

On appeal, the defendant characterized the evidence as showing two robberies -- the appellate court conceded that the evidence "arguably" showed one robbery at the parking lot, once the robber carried away half the victim's money, and a second one after the pursuit, once the robber carried away the rest. (*Haynes, supra,* at p. 1290.) The defendant invoked these two "acts" of robbery to claim a sua sponte duty to give a unanimity instruction; that jurors had to unanimously agree that he aided and abetted at least one of the two robberies. (*Id.* at pp. 1290-1291, 1294.)

The appellate court held that the robberies were " 'so closely connected in time' " that the continuous course of conduct exception applied. (*Haynes, supra,* at p. 1295.) Specifically, the court noted that "[t]he two encounters were just minutes and blocks apart and involved the same property. The acts were successive, compounding, part of a single objective of getting all the victim's cash, charged as a single robbery, and arguably barred from multiple punishment by Penal Code section 654. Plus none of the loot was carried away to a place of temporary safety until all of it was obtained." (*Id*. at p. 1296.)

We find each of the foregoing three cases to be distinguishable to the case before us. Specifically, as to *Haynes*, in contrast to this case, it was only arguable that there were two completed robberies. (*Haynes, supra,* 61 Cal.App.4th at p. 1290.) Here, as

respondent concedes the evidence showed that appellant threatened Ms. Tugle and Ms. Cordell in the bedroom. Then, depending on who the jury believed, either Ms. Tugle was threatened again in the courtyard (Ms. Cordell's version of events) or by her truck (Ms. Tugle's version of events). Similarly, as to Ms. Cordell, she was threatened in the bedroom and again in the courtyard (Ms. Cordell's version of events).[8]

As to *Purcelle* and *Dieguez*, in each case the defendant did not challenge that the events happened, rather the defense was that the events did not happen the way the prosecutor alleged. (*Purcelle*, *supra*, 126 Cal.App.4th at p. 182 [defense was the broken card was not a counterfeit]; *People v. Dieguez*, *supra*, 89 Cal.App.4th at p. 275 [defense was each false statement alleged was the result of an innocent mistake in communication].) Thus, in essence, the defendant in each case admitted the "act" or "acts" occurred.

Certainly, the failure to instruct on unanimity is not error "unless there is evidence based on which reasonable jurors could disagree as to which act the defendant committed." (*People v. Shultz* (1987) 192 Cal.App.3d 535, 539-540.)

The problem in this case is there was a reasonable basis for the jury to distinguish between the acts because the witnesses themselves disagreed about when and where the criminal threats were made. Ms. Tugle claimed that she was threatened twice, once in the bedroom and once outside moments later when she was by her truck. Ms. Cordell testified she and Ms. Tugle were threatened twice, once in the hallway and once outside in the courtyard. Even the time line of events was contradictory. As noted, Ms. Tugle said she went to her truck immediately after she left the bedroom. Ms. Cordell testified that after the incidents in the courtyard and kitchen appellant left about two hours later and Ms. Tugle went to her bedroom; she remained there for approximately "an hour or

---

[8] According to Ms. Tugle appellant made a threat to kill Ms. Cordell shortly after he threatened to kill her while they were at the truck. However, Ms. Cordell was not by the truck, but was in the house; there was no evidence that she actually heard this threat.

so." Ms. Cordell said that she went in to Ms. Tugle's bedroom to talk to her about leaving, but Ms. Tugle said she had to get feed for the horses. She watched Ms. Tugle go to her truck by the hay barn and get in; she saw appellant by the truck. Appellant was outside the truck and Ms. Tugle was inside. She did not see any physical contact between appellant and Ms. Tugle. Ms. Tugle did not leave for 45 minutes.

We reiterate that the purpose of the unanimity instruction is to prevent a verdict that results from some jurors believing that the defendant committed one act and others believing that defendant committed a different act, without agreement on what conduct constituted the offense. (*People v. Washington* (1990) 220 Cal.App.3d 912, 915-916; *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) "The unanimity requirement is constitutionally rooted in the principle that a criminal defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged. [Citations.]" (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499-1500.)

In this case, given that the prosecution argued that any one of the acts was sufficient and that the witnesses disagreed on when and where the acts were committed, there is a reasonable basis to believe that the jurors may also have disagreed on which acts formed the basis for counts three and five. This record does not present only a remote "possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime." (*Russo*, *supra*, 25 Cal.4th at p. 1135.)

Some cases hold that the failure to instruct on unanimity is of constitutional dimension, requiring reversal unless the error is harmless beyond a reasonable doubt, applying the standard from *Chapman v. California* (1967) 386 U.S. 18, 24. (See *Melhado, supra,* 60 Cal.App.4th at p. 1536.) Other cases apply the test from *People v. Watson* (1956) 46 Cal.2d 818, 836, overturning a conviction only if " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (See *People v. Vargas* (2001) 91 Cal.App.4th 506, 562.)

No matter which standard we apply we cannot find the error harmless in this case. The evidence showed distinct and discrete acts in this case;[9] and was such that different members of the jury could have found appellant guilty of criminal threats in counts three and five based on different actions taken toward the victims, during each single incident. However, it is impossible to determine whether all of the jurors agreed as to the particular criminal act that formed the basis of the guilty verdicts in counts three and five. It is not dispositive that appellant presented only a credibility defense as to both the victims, because even if the jury believed one or other of the victims over his account, the jurors were still not well enough "informed of their duty to render a unanimous decision as to a particular unlawful act." (*Melhado, supra,* 60 Cal.App.4th at p. 1539.) Rather, some of them might have agreed upon the threats in the bedroom for both counts three and five as testified to only by Ms. Tugle. On the other hand, some jurors may have rejected Ms. Tugle's account of the threats in the bedroom and based count three on appellant's threat at the truck because Ms. Cordell did not testify to any threats in the bedroom, even though Ms. Tugle testified Ms. Cordell was present. Similarly, for count three, some jurors may have believed Ms. Cordell that there was a threat in the courtyard whereby appellant pulled a gun on Ms. Tugle and told her he was going to make her extinct. Equally, some jurors may have found this threat to be the basis for count five, when appellant turned on Ms. Cordell and told her that both she and Ms. Tugle were going to die.

In light of the evidence, the lack of a unanimity instruction, and the prosecutor's argument that any of these acts would suffice to find appellant guilty of counts three and

---

[9] Even the fact that the jury found the personal use of a firearm allegation true as to count three does not distinguish the acts. The menacing display of the handle of a firearm in appellant's waistband while he was threatening Ms. Tugle in the bedroom qualifies for personal use of a firearm. (*People v. Colligan* (1979) 91 Cal.App.3d 846, 849, 851 [use for purpose of § 12022.5]; cf *People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1434-1435 [use for purposes of § 12022.53].)

five, we cannot conclude that the jury unanimously agreed as to what constituted the acts as charged in counts three and five. Accordingly, we cannot conclude that the instructional error was harmless, and reversal is required on those counts alone.

Disposition

The judgment is reversed and the matter is remanded to the trial court for possible retrial on counts three and four only. If the prosecution elects not to retry appellant on counts three and five, the court is ordered to resentence appellant on counts one, two, six, seven and eight.

_____

ELIA, J.

WE CONCUR:

_____

RUSHING, P. J.

_____

PREMO, J.